83-1152

No.

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SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES X. BELL . . . . . Petitioner

versus

CITY OF LOUISVILLE . . . . Respondent

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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January ____, 1984

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Did the Kentucky Court of Appeals deprive petitioner, CHARLES BELL, of his constitutional right to due process of law by affirming the Louisville Civil Service Board's Decision to Dismiss him from employment with the Louisville-Jefferson County Board of Health?

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SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

CHARLES BELL - - - - - *Petitioner*

v.

CITY OF LOUISVILLE - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The petitioner, CHARLES BELL, respectfully urges that a Writ of Certiorari be granted to review the decision of the KENTUCKY COURT OF APPEALS entered October 14, 1983, affirming the decision of the LOUISVILLE CIVIL SERVICE BOARD to dismiss him from employment with the Louisville-Jefferson County Board of Health.

The list of proper parties to this action is: CITY OF LOUISVILLE, KENTUCKY AND JEFFERSON COUNTY BOARD OF HEALTH, a joint city-county agency.

OPINION BELOW

The unreported decision of the Kentucky Court of Appeals was entered on October 14, 1983. The unreported Order of the Jefferson Circuit Court was entered May 12, 1982.

JURISDICTION

The Court's jurisdiction is authorized by 28 U.S.C. §2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14, Section 1, of the Constitution of the United States, reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall aridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In March 1981, petitioner CHARLES BELL, was dismissed from his job as a painter with the City of Louisville and Jefferson County Board of Health. Bell appealed his dismissal to the Louisville Civil Service Board whereupon hearing was held and, unknown to Bell or his counsel, pre-hearing ex-parte communication between the chairman of the hearing panel and a secretary and employee of the City of Louisville resulted in the said chairman requesting two armed policemen to sit in the hearing room throughout the hearing.

Petitioner Bell contends that the presence of armed policemen at the hearing and the ex-parte pre-hearing communication grievously tainted the hearing and deprived him of due process, a fair hearing, property, and liberty, set forth by this Honorable Court in *Board of Regents* v. *Roth*, 408 U. S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), and in *Arnett* v. *Kennedy*, 416 U. S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974).

The foregoing denial of due process contention was first raised by counsel for Bell on appeal to the Jefferson Circuit Court where the ex-parte communication was discovered upon examination of the chairman of the hearing panel. The said contention was also raised on appeal to the Kentucky Court of Appeals by Bell's present counsel.

The Kentucky Court of Appeals disposed of Bell's denial of due process contentions by stating in its decision (pages 3 and 4) that:

1. Evidence was adduced by the trial court that it was common practice for police officers to be present during board hearings.
2. The chairman of the hearing panel testified in the Circuit Court that none of the other board members knew that he had requested the presence of two police officers.

Bell had no further right to appeal under Kentucky law. He did have an option to move for discretionary review of the Kentucky Court of Appeals' decision by the Kentucky Supreme Court. Under these circumstances petitioner verily believes that he is in compli-

ance with the Doctrine of Finality. *Thompson* v. *City of Louisville*, 362 U. S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960).

REASON FOR GRANTING THE WRIT

The chairman of the hearing board deprived Bell of his property interests, right to a fair hearing, and liberty to retain employment when he engaged in ex-parte communication without testing the truthfulness or accuracy of the allegations made by the secretary that Bell had threatened one of his former supervisors. *Jarett* v. *United States*, 375 F. 2d 777 (1967). It is stated in *Camero* v. *United States*, 375 F. 2d 777 (1967):

> "One of the fundamental premises inherent in the concept of an adversary hearing, particularly if it is of the evidentiary type, is that neither adversary be permitted to engage in an ex-parte communication concerning the merits of the case with those responsible for the decision."

The presence of two armed policemen in uniform at the hearing cast an onus upon Bell and created an atmosphere in which a fair hearing could not be held. Further, the ex-parte communication that Bell had threatened someone, and the hearing chairman's reaction to it, constituted an additional charge against Bell to which he had no opportunity to defend.

Bell vigorously stated at the Jefferson Circuit Court hearing on his appeal that no police officers are ever present except at police Civil Service hearings. It

would be utterly ridiculous for one to contend, as the hearing board chairman did, that the other members of the panel were not affected by the presence of uniformed, armed policemen.

Bell contends that the ex-parte communication between the hearing board's chairman and the City of Louisville secretary was within the hearing and knowledge of the remaining four board members and so tainted and prejudiced the adversary trial type hearing that he was deprived of property and liberty without due process of law.

CONCLUSION

For the reasons hereinabove stated, the Court is urged to issue the Writ of Certiorari to the Kentucky Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION RENDERED: OCTOBER 14, 1983; 2:00 P.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 82-CA-1794-MR

CHARLES X. BELL - - - - - - - *Appellant*

v.

CITY OF LOUISVILLE - - - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Henry D. Hopson, Judge
Case No. 81-CI-08452

AFFIRMING

BEFORE: LESTER, WILHOIT and DUNN, Judges.

DUNN, JUDGE. Bell appeals from the Jefferson Circuit Court judgment affirming the Louisville Civil Service Board's decision to dismiss him from his employment with the City of Louisville.

Bell was hired by the City of Louisville in 1978 as a "Crew Leader." His job consisted of performing various paint scraping and painting duties under the Louisville Department of Health's Lead Program. In August 1980, he was reclassified to "painter"; the reclassification required a 6-month probationary period. In February 1981, his probationary period was extended 30 days to clarify some of the incidents which ultimately caused his dismissal in March 1981.

After Bell was dismissed, he requested a hearing with the Louisville Civil Service Board. A hearing was held on

July 21, 1981, and the Board voted 4 to 1 to sustain the dismissal. Bell then appealed to the Jefferson Circuit Court, which affirmed the Board. It is from that Judgment that Bell appeals. We affirm.

The record reveals that there were 5 incidents from July, 1979 to March, 1981, which eventually led to Bell's dismissal. Two of these incidents involved his allegedly being away from his work site without permission and without advising his supervisor, two incidents involving his being verbally abusive to two secretaries who were employed by the City, and one incident involved insubordination with his supervisor. In his testimony he attempted to explain these incidents. His main excuse was that other staff members were out to get him. He also produced copies of his "Performance Appraisals" which indicated that he was consistently given satisfactory ratings and that there were no complaints about his actual work. Bell's basis for appeal is that the decision of the civil service board was not supported by substantial evidence and he was denied a fair and impartial hearing.

Addressing Bell's first basis of appeal, we recognize that an action taken by an administrative agency is arbitrary unless it is supported by substantial evidence. *American Beauty Homes Corporation* v. *Louisville and Jefferson County Planning and Zoning Commission*, Ky., 379 S. W. 2d 450 (1964). The transcript of the hearing held by the Louisville Civil Service Board on behalf of Bell contains testimony of several of Bell's co-workers and supervisors. The program co-ordinator testified as to an incident involving Bell verbally abusing a secretary; the witness was present during this incident and she also testified as to knowledge she had of another incident of abuse Bell had with a different secretary. There was also testimony from his direct supervisor that Bell had behaved in an insubordinate manner

with him and that he knew of several times when Bell was either attending to personal business during working hours or was not where he was supposed to be. In short, there is more than sufficient evidence in the record that the appellant's conduct was unsatisfactory.

Bell also contends that he was denied a fair and impartial hearing. According to the appellant's interpretation of the circumstances of the hearing, the chairman of the civil service board evidenced prejudice towards Bell because the chairman asked two police officers to be present during the hearing. The trial court held a hearing on this matter and evidence was adduced that two police officers were present but that it was common practice for police officers to be present during board hearings. The chairman of the board also testified that none of the other board members knew that he had asked for the police officers or why he had asked for them. Although the chairman voted in this matter, his vote was not determinative of Bell's dismissal; even if the chairman didn't vote, the votes of the other board members were sufficient for dismissal.

Administrative officers must execute the law committed to them fairly and honestly; equal treatment for everyone according to the standards and rules of action prescribed is required. *Commonwealth* v. *Frost*, Ky., 172 S. W. 2d 905 (1943). The evidence showed that the chairman requested the presence of the officers because of the threat or threats Bell allegedly made against one of his supervisors. The chairman testified that he judged Bell only on the evidence and that his vote did not effect the ultimate outcome. There is nothing in the record to indicate that either the chairman or the board treated appellant any differently than anyone else. No evidence was adduced that the presence of the officers affected the votes of the Board members or that the members would have voted differently without the presence of the officers.

We need not address the issues raised in appellee's motion to dismiss this appeal, since they have been rendered moot by virtue of the holding in this opinion.

The judgment of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

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APPENDIX B

JEFFERSON CIRCUIT COURT

EIGHTH DIVISION

No. 81 CI 08452

CHARLES X. BELL - - - - - - - *Appellant*

v.

CITY OF LOUISVILLE - - - - - - - *Appellee*

ORDER

This cause coming on to be heard by the Court without a jury and the Court having heard the evidence and considered the briefs and memoranda filed by the counsel, it is hereby ordered that the decision of the Civil Service Board is affirmed.

Henry D. Hopson, Judge

APPENDIX C

FINDING AND ORDER

A hearing was held on behalf of Charles X. Bell, dismissed Painter, to appeal his dismissal from the Louisville and Jefferson County Department of Public Health, by the Director of Health, the appointing authority. The appeal was heard by a quorum of the Board, consisting of George Kinkead, Vice-Chairman; Mrs. Anne DeLozier, Member; Mr. James Powers, Member; Mr. James Carr, Member; and Mr. William Meyers, Member. Mr. Mark Dobbins, was also present as Legal Counsel for the Board. This hearing was held July 21, 1981.

Both the appellant and the appointing authority were represented by counsel, these being Mr. Jonathan Goldberg, representing the Health Department, and Mr. Elgin Crull, representing Mr. Bell.

Evidence was introduced and witnesses testified, and the Board made the following finding and order:

1. Mr. Bell was employed as a Crew Leader by the Health Department January 3, 1978, and certified as a regular employee on July 2, 1978. Mr. Bell was subsequently given a qualifying exam and appointed to the position of Painter on August 11, 1980, thus beginning a 6 month probationary promotional period, which was extended by the Civil Service Board for 30 days at the request of the Health Department, to expire March 9, 1981;
2. Mr. Bell was dismissed on the last day of this extension for Unsatisfactory Completion of Probationary Period;
3. Testimony indicated that Mr. Bell has a history of unexcused absences from the assigned work areas;

inability to deal courteously with co-workers; and displaying aggressive and intimidating behavior;

4. No specific faults were found with Mr. Bell's actual work, however, his absence from assignments were found to be for use of the Health Department vehicle for personal errands, which is specifically prohibited;
5. Mr. Bell failed to notify his immediate supervisor, or anyone at the Health Department when he would not be reporting for work, however, he did indicate on his weekly report that he was working at 1241 S. Clay, on March 2nd, and March 5th, 1981.
6. Two employees of the Public Health Department testified that Mr. Bell was not at 1241 S. Clay on March 2nd, but did work at that address on March 5th. A check with the resident indicated a Painter had been at that address one day, but definitely not two days, as indicated by Mr. Bell, which constituted falsification of records.

Wherefore, it was the decision of the Civil Service Board that the action of the appointing authority in dismissing Charles X. Bell be sustained, by a vote of four in favor, one against.

For The Civil Service Board

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No. 83-1152

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES X. BELL - - - - - - Petitioner

versus

CITY OF LOUISVILLE - - - - - Respondent

BRIEF FOR RESPONDENT, CITY OF LOUISVILLE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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February 10, 1984

WESTERFIELD-BONTE CO., 819 W. KENTUCKY—P.O. BOX 3291, LOUISVILLE, KY.

QUESTIONS PRESENTED

Has the Petitioner improperly failed to name as a party the Louisville-Jefferson County Board of Health, thereby violating Rule 19 of the Rules of the Supreme Court of the United States and causing this Court to be without jurisdiction over this matter?

Did the Petitioner fail to meet his burden of proof at trial on the issue of whether the action of the Louisville Civil Service Board in affirming the decision of the Louisville-Jefferson County Board of Health to terminate the Petitioner was arbitrary?

Did the Kentucky Court of Appeals deprive Petitioner, CHARLES X. BELL, of his constitutional right to due process of law by affirming the Jefferson, Kentucky Circuit Court's decision to uphold the termination of Petitioner by the Louisville-Jefferson County Board of Health?

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SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1152

CHARLES X. BELL - - - - - *Petitioner*

v.

CITY OF LOUISVILLE - - - - *Respondent*

BRIEF FOR RESPONDENT, CITY OF LOUISVILLE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

STATEMENT OF THE CASE

Petitioner, Charles X. Bell, was employed as a painter by the City of Louisville and Jefferson County Board of Health (hereinafter referred to as "Health Department") on January 3, 1978. He was dismissed from said employment on March 9, 1981. Pursuant to Section 90.190(1) of the Kentucky Revised Statutes, Petitioner appealed his dismissal to the City of Louisville Civil Service Board (hereinafter referred to as "Civil Service Board"), the City of Louisville agency charged with the duty of administering the classified service system for certain City of Louisville and joint City of Louisville and Jefferson County, Kentucky agencies, including, among others, the Board of Health.

Petitioner's Civil Service hearing was held on July 21, 1981. At that hearing, the Civil Service Board upheld Petitioner's dismissal by a vote of four to one. Petitioner appealed that decision to the Jefferson

Circuit Court. After a hearing held in that Court on February 19, 1982, the Department of Health's decision to terminate the Petitioner, Mr. Bell, was again upheld. The Petitioner then appealed to the Kentucky Court of Appeals and after weighing the evidence submitted and arguments presented, that Court also upheld, based upon the merits of the case, the Health Department's decision to terminate the Petitioner. The Kentucky Court of Appeals never reached a decision on the Motion of the City of Louisville to dismiss the appeal for procedural errors on the part of the Petitioner, to wit, his failure to properly name and serve all of the required parties to the action.

Of the two entities who were parties-defendant at the Jefferson Circuit Court level, the trial level, only the City of Louisville was named as a party-appellee in the Petitioner's Notice of Appeal to the Kentucky Court of Appeals. The Board of Health was not then named as a party-appellee nor was it ever named in any subsequent pleadings filed with the Court of Appeals, in spite of the fact that the Board of Health was named and treated as a party at the trial court level. Therefore, the appeal to the Kentucky Court of Appeals was clearly defective in its failure to join an indispensable party—the Board of Health.

This failure on the part of the Petitioner was compounded by a mistake — apparently clerical — on the Board of Health's part. In short, while the City of Louisville was the only party-appellee named in the Notice of Appeal, the Appellant's Brief was served *only* upon the Board of Health and *not* upon the City

of Louisville. Counsel for the Board of Health wrote, served, and filed a responsive brief in spite of the fact that his client had not been made a party-appellee. To further complicate matters, counsel for the Board of Health signed off on all pleadings which he filed as counsel for the City of Louisville. Of course, he was not ever authorized to act for the City of Louisville and presumably his action must be explained as a clerical oversight.

The failure of the Petitioner to make the Board of Health a party to the Appeal to the Kentucky Court of Appeals; the failure of the Petitioner to serve his Brief with the Kentucky Court of Appeals on the City of Louisville, whom he did make a party; and the Board of Health counsel's error in improperly stating his affiliation rendered this case a hopeless comedy of errors, resulting in prejudice to the only party who was not at fault at the Kentucky Court of Appeals level—the City of Louisville. The City of Louisville was never served with the Petitioner's Brief to the Kentucky Court of Appeals and thus assumed, until it received informal notice of oral arguments before the Kentucky Court of Appeals, that the Petitioner's appeal to the Kentucky Court of Appeals was ripe for dismissal.

A Motion To Dismiss was filed by the City of Louisville based upon the Petitioner's failure to comply with Kentucky Civil Rules 76.12(5) and (6) in that an indispensable party was not properly joined in the Kentucky Court of Appeals action. Those rules require service upon each adverse party to an appeal and re-

quire each Brief to bear on its front cover a statement by the attorney or party that service has been made as required. The Petitioner failed to comply with these explicit requirements in that a copy of his Brief to the Kentucky Court of Appeals was not served upon the City of Louisville or its counsel. Therefore, Kentucky Civil Rule 76.12(8)(a), which states that "a Brief may be stricken for failure to comply with any substantial requirement under this Rule 76.12" should have been applied by the Kentucky Court of Appeals to strike Petitioner's Brief to the Kentucky Court of Appeals and therefore render his Petition for Writ of Certiorari defective.

The Petitioner has taken this comedy of errors one step further and now files a Petition for Writ of Certiorari to the Kentucky Court of Appeals with the United States Supreme Court and has once again named only the City of Louisville as a Respondent. The Louisville-Jefferson County Board of Health is an indispensable party and one required by Rule 19.6 of the U. S. Supreme Court Rules to be included in the present action before this Court. His failure to so name the Board of Health renders his Petittion defective and the Court without jurisdiction.

Notwithstanding the procedural defects, the Petitioner contends that the hearing before the Louisville Civil Service Board was tainted as a result of a prehearing ex parte communication between the Chairman of the Louisville Civil Service Board and a Secretary to the Civil Service Board which resulted in the Chairman of the Civil Service Board requesting two armed

policemen to sit in the hearing room throughout the hearing.

It is readily admitted by the Respondent, City of Louisville, that at the hearing of the Petitioner's appeal before the Civil Service Board, two City of Louisville police officers were present in the room at the time of the hearing and were there at the request of the acting Chairman of the Louisville Civil Service Board, George Kinkead. Petitioner's "Statement of the Case" does not make clear, though, the fact that the communication which led to the acting Chairman's request for police presence came from an employee of the Louisville Civil Service Board and not from the Department of Health or any of its employees or its attorney. Therefore, there was no ex parte communication between the trier of fact, the Civil Service Board, and the Petitioner's adversary, the Department of Health.

Petitioner's contention that the Civil Service hearing was tainted and unfair because of the presence of police officers has been raised at every level of appeal in this matter. The response has been the same at every level as well, to wit, that no prejudice was visited upon the Petitioner as a result of the police presence.

ARGUMENT

I. The Petition for Writ of Certiorari Should Be Denied Because of Petitioner's Failure to Name as a Party the Louisville-Jefferson County Board of Health.

The Petition for Writ of Certiorari should be denied because the Petitioner fails to properly name

the Louisville-Jefferson County Board of Health as a party to this proceeding and is, therefore, in violation of Rule 19 of the U. S. Supreme Court Rules which requires, at Rule 19.6, that "[a]ll parties to the proceeding in the Court that judgment is sought to be reviewed shall be deemed parties in this Court. . . ."

The Kentucky Court of Appeals refused to enter final judgment in an action since a County was not joined as a party in *White* v. *Walker,* 10 S. W. 2d 1071, 226 Ky. 326 (1928). Furthermore, the Court said that if a judgment cannot be entered without prejudice to others, the case must be dismissed or joinder required. *Klene* v. *Campbell,* 213 S. W. 520 (Missouri 1919), also held that there shall be a Judgment of Dismissal when a Defendant is not served. In the case *sub judice*, the failure to serve the City of Louisville caused it to lose its status as a party to the action. Therefore, no Judgment entered can bind the City.

The failure to join as parties those whose interests would be affected by the Judgment was termed an "inescapable object" to the disposition of the case by the Court in *Buckner* v. *Clay,* 206 S. W. 2d 827, 306 Ky. 194 (1947). This case involved a taxpayer's challenge to a city's right to increase the assessment of real and personal property for City tax purposes without prior notice to that taxpayer. The Kentucky Court proceeded to define indispensable parties "as those who have such an interest in the subject that judgment cannot be made without affecting their interests."

It is obvious that the City of Louisville and the Board of Health are indispensable parties to the pres-

ent action. The failure to join the Board of Health under Rule 19.6 of the U. S. Supreme Court Rules and the Petitioner's failure in the Kentucky Court of Appeals to comply with Kentucky Rules of Court 76.12 (5) and (6), renders this Petition defective and the Court without jurisdiction.

A Court Order affecting only the City of Louisville in this matter would be hollow; the City of Louisville has no authority to act independently of the Board of Health; the Board of Health is not a City of Louisville agency nor is it funded entirely by City of Louisville funds. See § 212.350 *et seq.* of the Kentucky Revised Statutes. The City of Louisville Civil Service Board acts for the Board of Health in administering only very specific functions regarding certain Board of Health employees, while some Board of Health employees are excluded entirely from the Civil Service Board's authority. See §§ 90.150(1) and (2) of the Kentucky Revised Statutes. In fact, the City of Louisville Civil Service Board became involved in this matter only because of its authority to act as a reviewing body in the event of an appeal of a termination by a Board of Health employee. *See* § 90.190(1) of the Kentucky Revised Statutes. Therefore, failure to join the Board of Health as a party to this action is tantamount to appealing to an appellate court and leaving the argument to uphold the trial court's decision not up to the appealing party's trial level opponent, but up to the trier of fact, the Judge or Court, only.

II. Petitioner Failed to Meet His Burden of Proof on the Issue of Whether the Action of the Louisville Civil Service Board in Affirming the Decision of the Louisville-Jefferson County Board of Health to Terminate the Petitioner was Arbitrary.

The Petitioner has consistently failed to meet his burden of demonstrating that the Civil Service Board decision was arbitrary.

The Supreme Court of Kentucky has clearly structured the framework for public employee discharge appeals to Circuit Court in the case of *Brady* v. *Pettit*, Ky., 586 S. W. 2d 29 (1979). Therein, the Kentucky Court placed the burden of proving that the administrative agency acted arbitrarily upon the appealing party. The Petitioner is in agreement with this principle for in his brief to the Jefferson County Court, he stated as follows:

> It is well-established in civil cases that it is the duty of a party on [sic] whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. . . . Thus, Mr. Bell must show by a preponderance of the evidence that his claim that the Board acted arbitrarily is indeed valid. It is, of course, the burden of the Petitioner to demonstrate that the Civil Service Board acted arbitrarily in that its decision was not supported by substantial evidence. *American Beauty Homes Corp.* v. *Louisville and Jefferson County Planning & Zoning Commission*, Ky., 379 S. W. 2d 450 (1964).

It is clear from the record of the Civil Service Board hearing that there was ample evidence presented

against the Petitioner upon which the Civil Service Board's decision to uphold the Health Department's decision to terminate could be based. The hearing record reflects testimony of the Petitioner's supervisor and other employees of the Health Department that the Petitioner verbally assaulted and intimidated a young secretary working for another City of Louisville department because she would not comply with Petitioner's request to her to deviate from the procedure she was instructed to use in matters involving purchasing or procurement; that Petitioner had been belligerent with this employee on previous occasions; that Petitioner provoked a verbal confrontation with a clerk-typist employed by the Board of Health; that Petitioner had behaved in a subordinate manner with his supervisor and that Petitioner had been found absent from his assigned work site but had falsified weekly activity reports to indicate otherwise. In short, the record in this matter is replete with evidence that the Petitioner's conduct as an employee of the Department of Health was unsatisfactory.

III. The Petition for Writ of Certiorari Should be Denied Because There Was No Denial of Due Process to the Petitioner in the Manner in Which the Civil Service Hearing was Conducted.

Evidence was adduced at the trial of this matter before the Jefferson Circuit Court that, while the acting Chairman of the Civil Service Board did, in fact, request police presence at the hearing, it was not at all unusual to have police officers present at Civil Service Board meetings or hearings. Police officers

are classified service employees of the City of Louisville and their representatives make it a practice to spend almost as much time in the Civil Service Board meeting and hearing room as do Civil Service Board members. The acting Chairman also testified that he did not discuss with any of the other Civil Service Board members the presence of the police, the reasons therefor, or Mr. Bell's past personnel record prior to the close of the hearing and the vote to uphold the decision of the appointing authority, the Health Department, to terminate the Petitioner. In fact, it was the Acting Chairman's testimony that, as far as he knew, the other Board members were not even aware that the police officers were present.

It was also testified to by the acting Chairman of the Civil Service Board that he judged the Petitioner, Mr. Bell, only on the evidence and that he was not prejudiced by the information concerning the Petitioner which caused him to request police presence. There is nothing in the record to indicate that either the Chairman of the Board treated the Petitioner any differently than anyone else and no evidence was adduced that the presence of the police officers affected the vote of the Board members or that the members would have voted differently without the presence of the officers.

Moreover, the vote of the Civil Service Board to uphold the termination decision was by a count of four to one. At the hearing on this matter in the Jefferson Circuit Court, the Petitioner, Mr. Bell, subpoenaed only the acting Chairman of the Civil Service Board

to testify. None of the other four Board members who participated in this case at the administrative level were asked or required to testify. The Petitioner has admitted throughout these proceedings that he has the burden of proof to show that the action of the Board was arbitrary. In order to demonstrate arbitrariness on the issue of police presence and the alleged prejudice resulting therefrom, the Petitioner's burden should require that he introduce the testimony of at at least a majority of the Civil Service Board members so that it could be determined that those members were aware of the presence of the police officers and of the reason for their presence and were affected thereby. Testimony of such a majority is necessary because a majority vote is needed to uphold or overturn the decision of the appointing authority. Therefore, the Petitioner falls far short of meeting his burden of proving that the presence of the police officers affected the votes of the Board members or that the members would have voted differently were it not for the presence of the police officers.

Petitioner has cited two cases in support of his argument that the Civil Service Board acting Chairman's request for police presence at the hearing so tainted the hearing as to deprive the Petitioner of his constitutional right to "property interests, right to a fair hearing, and liberty to retain employment." Those cases, *Jarett* v. *United States*, 451 F. 2d 623 (U. S. Court of Claims 1971), and *Camero* v. *United States*, 375 F. 2d 777 (U. S. Court of Claims 1967) are distinguished by fact situations vastly different than that

in the instant case. The latter case, *Camero, Id.* at 780, was decided for the Appellant, a United States classified service employee, because *his adversary's attorney* engaged in an ex parte communication concerning *the merits of the case* with those responsible for making a decision on the Appellant's appeal from termination of employment.

The former case cited by Petitioner, *Jarett* v. *United States,* 451 F. 2d at 629, indicates that the Appellant in that case, also a United States classified service employee, was granted a favorable decision by the Court of Claims because of that Court's determination that ex parte communications were considered in making an employment decision concerning the Appellant, in violation of specific requirements to the contrary, and that prejudice to the appealing employee definitely resulted.

In the case *sub judice* there was no proof to indicate either that any ex parte communications were *considered* by the Civil Service Board members *or* that prejudice resulted to the Petitioner from any ex parte communications to the Civil Service Board. In fact, as has been stated hereinabove, there was no true ex parte communication in this case at all. The communication to the acting Chairman of the Civil Service Board resulting in the request for police presence was made by a member of the acting Chairman's own Civil Service Board staff, the secretary of the Board, and not by a representative or employee of the Petitioner's adversary, the Department of Health.

SUMMARY

The Respondent, City of Louisville, bases its request for a denial of the Petition for Writ of Certiorari on three factors.

First, the Petition for Writ of Certiorari should be denied because of the Petitioner's failure to name as a party the Louisville-Jefferson County Board of Health. This failure is in violation of Rule 19.6 of the U. S. Supreme Court Rules and leaves the Court without jurisdiction in this matter.

Second, the Petitioner has failed to meet his burden of proof on the issue of whether the action of the Louisville Civil Service Board in affirming the Louisville-Jefferson County Board of Health to terminate the Petitioner was arbitrary. The record in this matter is replete with evidence upon which the Health Department's decision to terminate could be based.

Third, and finally, the Petition for Writ of Certiorari should be denied because there has been no denial of due process to the Petitioner in the manner in which the Civil Service hearing was conducted. Again, there is ample evidence in the record to reflect complete fairness in the conduct of the hearing by the Civil Service Board and no evidence to indicate that the Civil Service Board was prejudiced by the presence of police officers at the hearing or by any comments which may have been made to the Acting Chairman of the Louisville Civil Service Board by one of his staff members.

CONCLUSION

For the reasons reviewed in this Brief, the Petition for Writ of Certiorari to review the Judgment and Opinion of the Kentucky Court of Appeals should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Mark W. Dobbins, having first been duly sworn, state that copies of the foregoing Brief In Opposition To Petition for Writ of Certiorari were mailed, first class, postage prepaid, to John Swain, Goldberg & Simpson, PSC, First National Tower, Louisville, KY 40202, Counsel for Louisville-Jefferson County Board of Health; Cecil A. Blye, Sr., 247 S. Shawnee Terrace, Louisville, KY 40212, Counsel for Petitioner Bell, on this the 9th day of February, 1984. I further state that to my knowledge all parties required to be served have been served. I do further state that I have duly applied for permission to practice before the Supreme Court of the United States and am awaiting notification of action on my application by the Court.

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State of Kentucky
County of Jefferson } SS

Subscribed and sworn to before me by MARK W. DOBBINS this 10th day of February, 1984.

My Commission expires: August 3, 1987

Sandra Powell
Notary Public, State at Large, Ky.

I, James H. Highfield, having been admitted to practice before the Supreme Court of the United States, do hereby certify that I have knowledge that the foregoing Affidavit of Service of Mark W. Dobbins, Counsel for Respondent, City of Louisville, is true and correct, and that copies of the foregoing Brief In Opposition of Petition for Writ of Certiorari were duly mailed, in numbers required, to all counsel of record as sworn above on this the 10 day of February, 1984.

James H. Highfield
JAMES H. HIGHFIELD

PROOF OF TIMELY FILING

I, James H. Highfield, having been admitted to practice before the Supreme Court of the United States, do hereby certify that forty (40) copies of the foregoing Brief In Opposition of Petition of Writ of Certiorari have been timely filed by depositing same in a United States Post Office or mailbox, with first-class postage prepaid, properly addressed to the Hon. Alexander Stevas, Clerk, United States Supreme Court, on February 10th, 1984, within the time allowed for filing the Brief, and I, after having been duly sworn, state that the mailing took place at an office of the U. S. Post Office on said day within time permitted for said filing.

James H. Highfield

JAMES H. HIGHFIELD

State of Kentucky
County of Jefferson } SS

Subscribed and sworn to before me by JAMES H. HIGHFIELD this 10th day of February, 1984.

My Commission expires: July 27, 1986

Jonathan C. Hardy

Notary Public, State at Large, Ky.